FILED
JUN 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. ~~1035~~

ROBERT WOODS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

HOWARD T. SAVAGE,
189 W. Madison Street,
Chicago 2, Illinois,
FInancial 6-7631,
Attorney for Petitioner.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX

	PAGE
Petition	1
Reference to Official Report of Opinion in Court Below	2
Statement of Grounds Upon Which Jurisdiction of This Court Is Invoked	2
Questions Presented for Review	3
Constitutional Provision Involved in the Case	4
Facts in the Case Material to the Questions Presented and Statement of the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised	4
Argument Amplifying the Reasons Relied on for the Allowance of the Writ	7

List Of Authorities

Cases:

Cochran v. People, 175 Ill. 28, 32	7, 9
In re: Murchison, et al., (Mich. 1955), 75 S. Ct. 623, 349 U.S. 133, 99 L. Ed. 942	10
In re: Oliver, 68 S. Ct. 499, 333 U.S. 257	10
Ladakis v. U. S., C.C.A. Utah 960, 283 F. 2d 141	15
Moore v. U. S., 262 F. 2d 216, 104 U.S. App. D.C. 327, Cert. Denied, 79 S. Ct. 800, 359 U.S. 959, 3 L. Ed. 767	14
Patrick v. People, 132 Ill. 529, 534	12
People v. Brown, 336 Ill. 257, 258	9
Thompson v. City of Louisville, 80 S. Ct. 624, 382 U.S. 199	13

Statutes and Rules:

Ill. Rev. Stat., (1959), Chap. 38, Sec. 3	8
Federal Rules of Criminal Procedure, Rule 52, 18 U.S.C.A., Sec. 1257, Title 28	15

Others:

Bouvier's Dictionary, Vol. 1, p. 138 12
Due Process Clause of 14th Amendment to U. S. Constitution 10, 11
22 C.J.S., Criminal Law, 375(2) 12

APPENDIX

Opinion of Supreme Court of Illinois Sought to Be Reviewed 1a

(Petitioner has furnished nine copies of the printed record used in the Supreme Court of Illinois)

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No.

ROBERT WOODS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Your petitioner, Robert Woods, a citizen of the United States of America and of the State of Illinois, presently incarcerated at Illinois State Penitentiary at Joliet, Illinois, prays that this Court issue a Writ of Certiorari to review a judgment of the Supreme Court of Illinois, affirming the judgment of the Criminal Court of Cook County, Illinois, that he is guilty of the crime of attempt to produce an abortion. Petitioner further prays that, pending the disposition of this petition by this Court, he may be admitted to

bail upon giving bond according to law in such sum as the Court may deem proper, the bond to be approved by the Clerk of the Supreme Court of Illinois, or otherwise, as this Court may direct.

A. REFERENCE TO OFFICIAL REPORT OF OPINION IN COURT BELOW.

The Opinion of the Illinois Supreme Court is reported in 24 Ill. 2d 154; 180 N.E. 2d 475.

B. STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(1) The opinion of the Supreme Court of Illinois, affirming the Trial Court was filed on January 23, 1962.

(2) A Petition for Rehearing was filed on February 7, 1962, and was denied by the court on March 22, 1962.

(3) The statutory provisions conferring jurisdiction upon this Court to review the judgment of the court below by Writ of Certiorari are contained in Section 1257, Title 28, U.S.C.A. The particular portion of the aforesaid Section 1257, under which this Court's jurisdiction is invoked is as follows:

> "• • • Where any title, right, privilege or immunity is specially set up or claimed under the Constitution • • • of • • • the United States."

The rules of this Court under which this petition lies are Rule 19, providing for certiorari to State Courts where the State Court has decided an important state question in a way in conflict with applicable state law and where the State Court has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court so as to call for an exercise of this Court's power of supervision; Rule 22 allowing a petition to review the judg-

ment of a State Court within 90 days; and Rule 23 prescribing the form and contents of the petition.

Jurisdiction of this Court is also invoked under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the decisions of this Court defining and exercising its power thereunder to enforce fair proceedings in state criminal trials.

C. QUESTIONS PRESENTED FOR REVIEW.

(1) Does an indictment which charges merely that petitioner in "some way and manner, which is to said Grand Jurors unknown", used and employed some means and devices, a further description of which "is to said Grand Jurors unknown", fulfill the requirement universally recognized and accepted that a defendant be adequately notified of the charges against him so that he may prepare his defense thereto?

(2) Does evidence tending to show that petitioner planned, prepared for and intended to commit an abortion sustain a finding that he is guilty of an attempt to commit an abortion?

(3) Can an abortion be logically said to have been attempted where there was no touching of the female person intended to be aborted, and, where there is no evidence of any act committed by the petitioner which reasonably could be said to have constituted an act that could be reasonably expected to produce the elimination of the fetus from the womb of the mother?

(4) Where there exists no logical relation of the evidence to the conclusion reached by the trial court, i.e., where the evidence cannot be logically said to show an attempt to commit an abortion, is a finding of guilt and deprivation of

liberty without the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

(5) Does the Fourteenth Amendment of the United States Constitution require that defendants in criminal cases be sufficiently notified of the charges against them in the indictment or other paper instituting the proceedings?

(6) Is a federal question sufficiently raised in the courts below where the alleged denials of due process were exhaustively questioned by motions, objections, and points made on appeal, but without express reference to the applicable provisions of the United States Constitution?

D. CONSTITUTIONAL PROVISION INVOLVED IN THE CASE.

Amendment XIV to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

E. FACTS IN THE CASE MATERIAL TO THE QUESTIONS PRESENTED AND STATEMENT OF THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED.

After a trial by jury, petitioner was found guilty of attempting to produce an abortion. The sufficiency of the indictment was challenged by counsel for the petitioner by a written motion to quash the indictment (Abstract 3).

Eileen Witsman testified (Abstract 12) that she was an investigator for Accurate Detective Laboratories. She was 21 years old and had two children, one was born on May 25, 1960, and one ten days before the trial. On September 17, 1960, she was about two months pregnant. On September 22, 1960, she telephoned petitioner and told him she was pregnant and that she had been told he would help her get rid of the baby. He told her to come to his apartment (Abstract 13).

On that same afternoon Witsman and a policewoman, Mrs. Catherine Casey, met petitioner in the living room of his apartment. Casey was identified as Witsman's aunt. They discussed her pregnancy (Abstract 14). The petitioner said he was a doctor doing post-graduate work. He said his fee would be $250.00. He described the operation. An appointment was made for 10:30 A.M. on September 27.

On September 27, 1960, Witsman and Casey again met petitioner in the living room of his apartment after Witsman had been supplied $250.00 marked money. They were asked to be seated and Casey asked petitioner if she could be present during the operation. He said no. He then led them through the hallway into a kitchen and dining area where he said he was going to perform the operation.

In the kitchen and dining area were a large folding screen, a table, a stove with a white tin covered can on one of the burners, a large table with a sheet and a yellow cover and also a small table with various doctor's implements on it. Pills and books were also on it and an open suitcase was on the floor that had various doctor's things in it (Abstract 18).

They went back to the living room where petitioner gave Witsman a glass of water and some pills. At this time she

gave him the $250.00. She pretended to take the pills and slipped them into her purse. Petitioner then asked her to come to the kitchen. Witsman went into the kitchen with the petitioner. He asked her to be seated by the side of the table and told her that he would have to examine her first. She started to take off her shoes and unfasten her blouse but the petitioner stated that he wanted to talk to her first. He asked her if she was nervous and then went on to explain the operation. After the conversation, Mrs. Casey came to the door and asked if Witsman was ready for the operation. The petitioner said no and asked Mrs. Casey to return to the living room.

Petitioner asked Witsman if she was ready for the operation and she said yes. She then started to unfasten her blouse and at this time Mrs. Casey placed the petitioner under arrest.

At no time did the petitioner put his hand on any part of Witsman's person (Abstract 26). She had removed her shoes herself and that she had only opened a couple of buttons on her blouse and that she had removed no other articles of clothing from her person (Abstract 27). At no time did she get on the table and expose her private parts. Apart from her handing the petitioner the money and getting the pills from him the petitioner did nothing else.

The pills given Witsman by petitioner were sedatives or large doses for sleeping. They were not an abortifacient (Abstract 59).

The State then rested its case in chief. The defense then presented a motion that the jury be instructed to find the petitioner, Robert Woods, not guilty (Abstract 61). A hearing was held on said motion and the motion was denied. No evidence was offered by petitioner.

The jury returned a verdict finding the petitioner guilty of attempt to commit abortion (Abstract 71).

A hearing was had on motion for a new trial and a motion in arrest of judgment, both of which were denied, and the petitioner was sentenced to the State Penitentiary for a period from one to ten years and is now serving that sentence.

In his brief in the Supreme Court of Illinois, petitioner again raised the point that the indictment in the case is fatally defective in that it failed to inform the petitioner of the nature of the accusation against him so as to enable him to prepare his defense and that the indictment failed to state an offense under the applicable Illinois statute. He also argued the point that the evidence, as a matter of law, is insufficient to show an attempt to procure an abortion (Ill. Sup. Ct. Record. p. 5). The opinion of the Illinois Supreme Court was that the indictment was sufficient in every respect and that the evidence was sufficient (Ill. Sup. Ct. Record, pp. 11-13). Petitioner raised the same points again in his Petition for Rehearing (p. 16) and the Court denied his Petition for Rehearing (p. 17).

F. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

No question exists that until the opinion of the Supreme Court of Illinois in the case at bar, Illinois law declared indictments similar to the one in th case at bar to be void and as failing to charge an offense under the statutes and law of Illinois.

In *Cochran* v. *People*, 175 Ill. 28, 32, under a statute substantially the same as the statute in existence at the time

of the trial of the case at bar and of the judgment of the Illinois Supreme Court, the defendant was charged with procuring an abortion. One count of the indictment stated that defendant "did * * * administer and use on one Stella Roberts * * * a certain instrument." A second count charged that defendant "did * * * use on and administer on one Stella Roberts," etc. The Supreme Court of Illinois held the indictment to be wholly insufficient, alluding to the fact that no attempt whatever was made in either count to state how or in what manner the instrument was used or administered.

The Illinois Court went on to say:

> "The manner in which the offense defined in section 3 of division 1 of the Criminal Code may be committed is 'by means of any instrument, medicine, drug or other means.' The act of using an instrument is in no way described. The language, 'by means' of any instrument, is broad enough to include any and every means by which an instrument could be used for the purpose of causing an abortion. It is, therefore, clear, that in order to make a good indictment against one for the commission of a crime by means of an instrument, as is said in *Johnson* v. *People, supra, the 'pleader is bound to set forth the acts specifically—that is, state with reasonable certainty the manner in which the act was committed* * * *.' (Emphasis added.) * * * A jury might conjecture or imagine from the allegations the nature of the offense with which the defendant is charged, but it cannot be said that it is so plainly alleged that it could be easily understood by him or the jury."

The Illinois statute involved, Chap. 38, Section 3, incorporates the language:

> "by means of any instrument, medicine, drug or other means whatever"

In *People* v. *Brown*, 336 Ill. 257, 258, the Supreme Court of Illinois stated the purpose of Section 9 of Article 2 of the Illinois Constitution to be that of giving to the accused, "such specific designation of the offense as will enable him to prepare his defense and to plead the judgment in bar of a subsequent prosecution for the same offense."

We invite the Court's attention to the fact that the indictment in the case at bar charging that the petitioner attempted to commit an abortion "in some way and manner which is to said Grand Jurors unknown" and that he used and employed "some means and devices, a further description of which is to the Grand Jurors unknown" failed not only to state the manner in which the attempt was made, but failed also, to inform the petitioner of the instrument, medicine, drug or whatever that he is charged with using in his alleged attempt to commit abortion.

The indictment in the case at bar was thus less informative than that in *Cochran* v. *People*. The People of Illinois, in their brief, admitted that *Cochran* was the law of the State of Illinois, but stated that the decision was incorrect and noted cases in several jurisdictions foreign to Illinois which allegedly failed to follow the *Cochran* rationale (People's Brief, Ill. Sup. Ct. Record, p. 7).

It will be noted that in all the cases cited by the People, in justification of the indictment in the case at bar, the indictments did, in fact, set forth the means by which the abortion was performed or attempted. This fact was demonstrated to the Illinois Supreme Court by the petitioner's Reply Brief (Ill. Sup. Ct. Record, p. 9). The judgment of the Illinois Supreme Court that the Criminal Court of Cook County properly overruled petitioner's motion to quash in the case at bar was based upon these opinions in these foreign jurisdictions, and, it is the contention here that the

opinion is violative of Illinois law and constitutes error of a kind so fundamental that it cannot be said that the petitioner had a fair and impartial trial according to the requirement of the Due Process Clause of the Fourteenth Amendment, for the reason that the indictment was plainly insufficient to enable him to prepare his defense and to plead the judgment in bar of a subsequent prosecution for the same offense.

If the People's theory had been that petitioner had attempted to commit the abortion by thrusting an instrument into her private parts and he had been found not guilty, could not the petitioner have been subsequently indicted for the same offense of attempting to commit the abortion by having administered pills or drops or medicines calculated to cause the same? Could the petitioner have anticipated from a reading of the indictment that the theory of the prosecution would be that he attempted to commit the abortion by handing sedative or sleeping pills to the complaining witness, and was he enabled by the indictment to prepare a defense to such theory of the prosecution?

In *In re*: *Murchison, et al* (Mich., 1955), 75 S. Ct. 623, 349 U.S. 133, 99 L. Ed. 942, this Court reaffirmed its holding in *In re: Oliver*, 68 S. Ct. 499, 333 U.S. 257, that "due process requires as a minimum that an accused be given a public trial *after reasonable notice of the charges*, (*) and a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel." No question exists of the correctness of the proposition that if the indictment in the case at bar did not give reasonable notice to petitioner of the charges against him, the requirements of the

---

(*) Italics ours.

Due Process Clause of the Fourteenth Amendment to the United States Constitution was not satisfied, and this Court should exercise its power of supervision under the Fourteenth Amendment and set aside the judgment of the Illinois Supreme Court sanctioning the departure of the trial court implicit in its refusal to quash the defective indictment on petitioner's motion.

2.

The charge of an attempted abortion in the case at bar was so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. The evidence in the case showed no more than that petitioner accepted money from the woman to be aborted and gave her two pills, which she did not use, to calm her. It is undisputed that these pills could in no way cause the woman to lose her unborn child and were mere sedatives or sleeping pills.

We invite this Court's attention to the fact that the Illinois Supreme Court, in its opinion, stated that the following acts proved the attempt:

> "That defendant received and counted the $250 fee for which he had bargained. The kitchen which was to serve as an operating room was ready. The instruments necessary to the performance of the operation were in a pan on the stove. A sedative had been given to the woman although, unknown to the defendant, she had not taken it. The nature of the operation was explained to allay her fears. The policewoman had been told to stay in the living room so the operation could be performed in private. The woman said she was ready and had begun to remove her clothing." (Appendix, p. 3a)

The Court also stated: "Mere preparation to commit a crime, of course, does not constitute an attempt to commit it."

We respectfully contend that all of the things stated by the Court amounted to no more than mere preparation and cannot reasonably, logically be said to have been more than preparation. We invite this Court's attention to the fact that at least one of the alleged acts described by the Illinois Court as part of the attempt was not an act of the petitioner at all, i.e., the woman, without invitation from the petitioner, began to unbutton her blouse (Abstract 19). Allaying the fears of the woman could hardly be said to be an act constituting an attempt to commit the abortion, if that is, in fact, why petitioner explained the nature of the operation. There appears to be no sufficient evidence that this was the purpose of his explanation. The woman's stating that she was ready could hardly be said to be an act of petitioner toward an attempt to commit the abortion. If in fact petitioner had, himself, placed some instruments in a pot on the stove in the kitchen, there being no evidence that he did, the fact that they were there cannot logically be called an act of petitioner constituting an attempt to commit an abortion. There is no evidence to support the court's conclusion that these instruments were necessary to the performance of an abortion. This was obviously mere preparation, if anything. Assuming that the evidence is true, it must be conceded and can be concluded only that petitioner intended to commit an abortion but before that intention flowered into an attempt, he was arrested.

Quoting Bouvier's Dictionary (Vol. 1, p. 138), the Illinois Supreme Court said in *Patrick* v. *People*, 132 Ill. 529, 534:

> "An attempt to commit a crime is an endeavor to accomplish it carried beyond mere preparation, but falling short of the execution of the ultimate design, in any part of it."

To constitute an attempt, there must be some appreciable fragment of the crime committed. 22 C.J.S. Criminal Law, 375(2).

One great legal writer summed up the law of attempt to commit crimes, "to make the act an indictable attempt, it must be a cause, as distinguished from a condition." (Wharton)

There is in the evidence in this case not one act which could logically, reasonably have been calculated to cause the elimination of the fetus from the womb of the expectant mother. The undisputed evidence is that the petitioner never touched the body of the woman in any way.

In *Thompson* v. *City of Louisville*, 80 S. Ct. 624; 382 U.S. 199, this Court held that

> "Just as 'conviction upon a charge not made would be sheer denial of due process', so it is a violation of due process to convict and punish a man without evidence of his guilt."

Under the holding of the Supreme Court of Illinois, any preliminary preparation for an offense would constitute an attempt to commit it. If a man intended to commit a robbery, put a gun in his pocket, contacted the intended victim by telephone and urged the victim to meet him at a certain darkened spot, but was arrested before he got there, would he be guilty of an attempt to commit a robbery? Or does not logic demand that we conclude that he intended to commit a robbery.

In some quarters, it has been urged that this Court should not review the judgment of the Illinois Supreme Court because the federal questions sought to be reviewed here were not raised in the trial court or in the Supreme Court of Illinois. The federal questions in the case at bar were, in fact, raised in the trial court by motion to quash the indictment and by motions for new trial and in arrest of judgment. Does the general policy of the court requiring that federal questions be raised in the court below before

they may be reviewed dictate that these questions be raised by express reference to federal law or the federal constitution? It appears that the raising of the question of the sufficiency of the indictment necessarily involves the United States Constitution and that a conviction sustained by no evidence involves necessarily the United States Constitution whether or not an express reference is made to that Constitution. It is clear that the questions were raised in the trial court and in the Supreme Court of Illinois, and, in the Supreme Court of Illinois, express reference was made to the appropriate provisions of the Illinois Constitution.

In the case of *Moore* v. *U. S.*, 262 F. 2d 216, 104 U.S. App. D.C. 327, cert. denied, 79 S. Ct. 800, 359 U.S. 959, 3 L. Ed. 767, the Court gave as a reason for the policy under discussion:

> "A defendant may not lie back, take his chance on acquittal on the issue on which he places his main reliance and when that fails, ask to have the judgment of conviction reversed on a ground not pressed on the trial court." (p. 218)

Another logical reason for the policy would appear to be the desire of the higher courts to protect themselves from being overburdened with issues which could have and probably would have been decided by the lower courts in a way that possibly would have made an appeal unnecessary. Neither of these reasons for the rule are apparent in the case at bar. Petitioner here vigorously urged the insufficiency of the indictment in the trial court, and vigorously urged the total insufficiency of the evidence to support the charge by motions for directed verdict and for a new trial and in an arrest of judgment in the trial court. He vigorously urged these points in the Supreme Court of Illinois in his first brief, in his reply brief, and in his petition for rehearing. He did not lie back and take his chances

on acquittal on the issues on which he placed his main reliance nor did he fail to give the courts below every opportunity to consider and rule upon the very issues he seeks to present to this Court for review. This Court undoubtedly has the power and should exercise the power to review judgments where plain errors of substantial nature violative of due process were committed by the lower courts, whether or not the defendants in urging these errors said expressly that they amounted to violations of due process.

We invite the Court's attention to Rule 52(b) of the Federal Rules of Criminal Procedure:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." (18 U.S.C.A.)

In *Ladakis* v. *U. S.*, C.C.A. Utah 960, 283 F. 2d 141, the Court, interpreting Rule 52(b) held that in criminal cases appellate courts may note and correct grave errors affecting substantial rights of accused even where they were not complained of in the trial courts.

The errors here were brought to the attention of the lower courts. We do not contend that the Federal Rules of Criminal Procedure are necessarily binding upon this Court, and believe that in its wisdom this Court could depart from the policy of the said rules. We urge however, that Rule 52(b) expresses a considered policy of all federal courts which well might be adopted by every court in the land in the interest of substantial justice and the protection of the substantial rights of the people of the United States.

Respectfully submitted,

HOWARD T. SAVAGE,
189 W. Madison Street,
Chicago 2, Illinois,
Attorney for Petitioner.

APPENDIX.

Opinion of the Supreme Court of Illinois

Docket No. 36679—Agenda 25—November, 1961.

The People of the State of Illinois, Defendant in Error v. Robert Woods, Plaintiff in Error.

Mr. Justice House delivered the opinion of the court:

Defendant was tried in the criminal court of Cook County on an indictment charging him with attempted abortion. From the judgment of conviction entered on the jury's verdict of guilty, defendant brings this writ of error.

Defendant first contends that the indictment was fatally defective. It alleged in part, that defendant "on the twenty seventh day of September [1960] * * * unlawfully, feloniously and wilfully, in some way and manner which is to said Grand Jurors unknown used and employed some means and devices a further and more particular description of which is to said Grand Jurors unknown, upon one Eileen Witsman * * * with the intent * * * then and there to produce the abortion and miscarriage of said Eileen Witsman; and that by the use and employment of said means and devices * * * in said way and manner * * * upon said Eileen Witsman then and there unlawfully, feloniously, wilfully and knowingly attempted to procure the abortion and miscarriage of said Eileen Witsman; * * *." The statute under which this indictment was drawn makes it a crime "by means of any instrument, medicine drug or other means whatever, * * * [to attempt] to procure or produce an abortion or miscarriage, * * *." Ill. Rev. Stat. 1959, chap. 38, par. 3.,

Defendant argues that this indictment is insufficient to inform him of the nature of the crime charged because it fails to allege the manner in which an instrument was used in an attempt to procure an abortion. The purpose of an indictment is to furnish the accused a description of the charge against him to enable him to prepare his defense and to prevent a subsequent prosecution for the same offense. This indictment apprised defendant of the time, place, victim and nature of the offense. It further alleged, although without specificity, that some means and devices were employed in some way and manner in an attempt to procure an abortion. We fail to see, as defendant contends, that his preparation of a defense could depend on the indictment containing an exact description of the instrument and of its manner of use. We conclude that adequate information was provided for the preparation of defendant's defense and that the indictment was sufficient, anything in *Cochran* v. *People*, 175 Ill. 28, notwithstanding. This view is in accord with decisions in other jurisdictions. *Thomas* v. *State*, 156 Ala. 140, 47 So. 257; *People* v. *T. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416; *Wasy* v. *State*, 234 Md. 52, 123 N.E. 2d 462; *State* v. *Hanson*, 53 S.D. 205, 220 N.W. 518; *State* v. *Gaul*, 88 Wash. 287, 152 Pac. 1029.

Defendant also contends that the evidence was insufficient to establish an attempt to produce an abortion. Eileen Witsman and policewoman Catherine Casey, pursuant to an agreement made with defendant several days earlier, went to his apartment. Defendant showed them the kitchen where he was going to perform the operation. They saw a table with a sheet and cover; a large folding screen between the table and the living room door; a chair at one end of the table; a stove with a covered pan on the burner which was

later found to contain instruments commonly used in performing an abortion; an open suitcase with various medicines and instruments in it; and a small table with medical instruments and books on it. After seeing this equipment, they returned to the living room and defendant gave Eileen two sedative pills. She pretended to swallow them as defendant counted the $250 fee which had previously been agreed upon. Defendant told policewoman Casey to remain in the living room. He then took Eileen to the kitchen, sat her down on the chair beside the table, and told her he would have to examine her. Since she appeared nervous, he explained the operation to her. Policewoman Casey entered the room and asked if he had started. Defendant said that he was calming Eileen because she was nervous and asked the polic woman to return to the living room. Eileen had removed her shoes and suit jacket and had unbuttoned two of the buttons on her blouse. Defendant then asked her if she was ready for the operation and she said yes. As she was about to finish unfastening the buttons of her blouse, policewoman Casey again entered the kitchen and asked defendant if he was ready to proceed. He said "Yes," and indicated that she must leave the room. Apparently fearing that the operation w is about to be consummated, she arrested him.

There are no cases in Illinois which consider this precise point and very few in other jurisdictions. In *People* v. *Gallardo*, 257 P. 2d 29 (Cal. 1953), a conviction for attempted abortion was reversed where the woman was merely in the defendant's waiting room and defendant had done no more than accept the fee. The court said at page 35: "In order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime and did a direct, unequiv-

ocal act toward that end; preparation alone is not enough, and some appreciable fragment must have been accomplished. * * * There is no evidence that [defendant] started to provide, supply or administer any medicine or to use or employ any instrument or other means to procure the miscarriage * * *." However, where the woman was on the operating table and the defendant had an instrument in his hand, the proof of attempt was deemed sufficient, i.e., defendant had started to employ means to procure a miscarriage. (*People* v. *Reed*, 275 P. 2d 633 (Cal. App. 1954).) In another case, an attempt at abortion was proved where the woman was in an upstairs room to undress and the defendant was waiting below with the operating paraphernalia ready and the instruments in a pan on the stove. (*People* v. *Berger*, 280 P. 2d 136 (Cal. App. 1955).) The court held that the boiling of the instruments was a sufficient "first step" towards commission of the intended crime where the intent with which the act was done was clearly established.

Here, an attempt to perform an illegal operation is the charge against defendant. The evidence shows that defendant received and counted the $250 fee for which he had bargained. The kitchen which was to serve as an operating room was ready. The instruments necessary to the performance of the operation were in a pan on the stove. A sedative had been given to the woman although, unknown to the defendant, she had not taken it. The nature of the operation was explained to allay her fears. The policewoman had been told to stay in the living room so the operation could be performed in private. The woman said she was ready and had begun to remove her clothing. Defendant was prevented from further pursuing his illegal endeavor by his arrest.

(Supreme Court Opinion)

Mere preparation to commit a crime, of course, does not constitute an attempt to commit it. We feel however that an attempt does exist where a person, with intent to commit a specific offense, performs acts which constitute substantial steps toward the commission of that offense.

We believe that proof of the administering of the sedative, coupled with other substantial steps toward consummation, which was prevented only by the policewoman's intervention, is sufficient to sustain the conviction of attempted abortion. The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.